

**NEW YORK
CITY BAR**

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U.S. Sentencing Commission
Attn: Public Affairs
One Columbus Circle NE
Washington, DC 20002-8002

***Re: Proposed Amendments on Privilege Waiver Language in
the Federal Sentencing Guidelines***

Dear Sir/Madam:

The Association of the Bar of the City of New York¹ (the "Association"), respectfully submits this letter, prepared by its Committee on Criminal Law ("the Committee"), in response to the Commission's January 27, 2006 Notice of Proposed Amendments, 71 F.R. 4782-4804, which seeks public comment on whether the privilege waiver language in the commentary at Section 8C2.5 should be deleted or amended. *See* U.S. Sentencing Commission, *Guidelines Manual*, § 8C2.5(g), comment 12 (Nov. 2004). This letter explores a few of the principal concerns that arise in connection with waivers of the attorney-client privilege and work product protection during corporate investigations, and provides the Committee's recommendations to help ensure that these

¹ The Committee is one of the oldest and largest local bar Committees in the United States, with a current membership of over 22,000 lawyers. The Committee serves not only as a professional Committee, but also as a leader and advocate through the work of over 170 committees. Among other activities, the Committee's committees prepare comments for legislative bodies, regulatory agencies, and rule making committees on pending and existing laws, regulations, and rules that have broad legal, regulatory, practical, or policy implications. Further information regarding the Committee can be found at its web site, <http://www.abcny.org>.

fundamental legal protections, which are essential to fair and effective corporate compliance regimes, will be respected and maintained.

1. *The current language is having unintended consequences.*

By 2004, when the Commission amended the Commentary to Section 8C2.5 of the Sentencing Guidelines for Organizations, requests for a waiver of the attorney-client privilege, once a rare event, had become a frequently used practice of prosecutors. The 2004 amendment effectively codified the practice, establishing it as a benchmark for regulators and prosecutors to determine whether an organization had engaged in the “timely and thorough cooperation” needed to obtain leniency. In the wake of this amendment, the Holder and Thompson Memoranda, and the Seaboard Report,² there has been a dramatic increase in government demands for access to privileged attorney-client communication and attorney work product. According to a survey recently conducted by the National Committee of Criminal Defense Lawyers, nearly three-quarters of the 1,400-plus inside and outside counsel who responded agreed that a “culture of waiver” has evolved in which government agencies expect a company under investigation to waive the attorney-client privilege or work product protection. Moreover, nearly three-quarters of outside counsel said that the expectation of privilege waiver was communicated rather than implied.³

The Committee’s members counsel their clients within this “culture of waiver” every day. Our members are active in the Southern and Eastern Districts of New York, and their practices routinely involve discussions of presumptive waivers with federal prosecutors, the SEC, and, as the practice has grown increasingly commonplace, with state authorities as well. Indeed, many of the Committee’s members find that, in the current climate, waivers of the attorney-client privilege and work product protection are almost always implied, and frequently directly discussed, in their conversations with federal prosecutors as well as state and federal agencies; often, such waivers are

² *Report of Investigation Pursuant to Section 2(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, SEC Release Nos. 34-44969 and AAER-1470 (October 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

³ This survey is available online at <http://www.acca.com/Surveys/attyclient2.pdf>.

demanding at the outset of investigations, before other alternatives for gathering information have even been considered.

Although the language in the Commentary of Section 8C2.5 does not explicitly require companies to surrender the attorney-client privilege and work product protection in order to receive a reduction in culpability score for cooperation under the Guidelines, and is in fact meant to limit compelled waiver, when a company's lawyers have gathered information about a potential violation and prosecutors and regulators do not have the same information, these prosecutors and regulators routinely assert that waiver would lead to "timely and thorough disclosure." This language has thus helped to reinforce the expectation of waiver among regulators, prosecutors, and defense lawyers.

Significantly, there is no obvious mechanism for challenging the government's routine assertion that waiver is "necessary." The government often demands waiver of a corporation's attorney-client privilege and work product protection as a precondition for the grant of cooperation that might prevent indictment or reduce punishment. In actual practice, these policies provide prosecutors and regulators with tremendous incentives and ability to push for ever greater disclosures. In contrast, companies under investigation have essentially no ability to resist the government's demands.

The Justice Department's McCallum Memorandum, issued on October 21, 2005, does not address the problem of a corporation's inability to mount a meaningful challenge to waiver. It is concerned principally with process and merely calls for each U.S. Attorney's Office to "establish a written waiver review process"; the McCallum Memorandum does not question the substance of Justice Department policy or even seek national uniformity of decision-making in this area.

In short, it appears that a company's decision to broadly waive work product protection and the attorney-client privilege – and all too frequently, *only* the decision to broadly waive – will be the test of whether the government deems a company to be cooperative. Because the charge of non-cooperation will typically have profoundly serious adverse effects on a company's public image and bottom line, companies are routinely forced to waive these protections whenever the government seeks it.

In addition, in virtually every jurisdiction – including the jurisdictions where the majority of the Committee's members commonly practice – the waiver of the attorney-

client privilege and work product protection for one party constitutes a waiver as to all parties. The Association is concerned that compelled waiver increases the cost of cooperation with the government. Once they are disclosed to the government, work product and privileged materials will inevitably be turned over to private plaintiffs, who can capitalize on the disclosure of sensitive information turned over to the government during a criminal investigation to strengthen their civil cases. The risk of expensive and time-consuming future litigation is a harsh penalty, particularly for organizations that have chosen to cooperate with the government on its terms.

Even if, in a given case, a waiver will speed the government's access to relevant information, it is not at all clear that the benefit in a given case outweighs these substantial systemic harms caused by a culture of routine waiver.

2. The Commentary has had serious adverse effects on the administration of justice.

The public policy justification for encouraging corporate waivers appears to be that waiver will lead to quicker and increased access to information for the government and that the justice system as a whole will benefit as a result. We suspect that the opposite is true. Compelled waivers do not enhance compliance with the law. Rather, corporate officers and employees who are reluctant to involve lawyers in business activities translates into a greater risk that those officers and employees will break the law. Routine government demands for waiver of attorney-client privilege and work product protection cause lawyers to lose the trust and confidence of the employees of the companies they represent. In turn, this erosion of trust and confidence undercuts lawyers' abilities to counsel compliance with the law effectively.

Compelled waivers also hobble internal corporate investigations and prevent companies from detecting and correcting illegal activity. When employees suspect that anything said to a company lawyer can and will be used against them, both by their employer and, potentially, by a prosecutor, they may refuse to say anything at all.

3. *The Commentary should be amended to stress that waiver is not a required element of cooperation.*

The Association notes that, in addition to the unintended consequences noted above, waivers of attorney-client privilege and work product protection may simply not be appropriate in all cases of corporate wrongdoing. We therefore recommend that the Commission adopt affirmative language that emphasizes, without exception, that waivers of attorney-client privilege and work product protection should not be used to determine whether a sentence reduction under the Guidelines is warranted. Moreover, we urge the Commission to adopt language that ensures that cooperation requires the disclosure only of "all pertinent *non-privileged* information known to the organization," and that such waivers are to be requested, if at all, on a case-by-case basis, rather than demanded uniformly in order for a corporation to receive credit for cooperation with the government during an investigation.

Finally, the Association is concerned that this issue has broader implications for the integrity of the attorney-client relationship generally, beyond the context of business organizations. A robust attorney-client relationship is fundamental to our adversarial system of justice. Without it, and its accompanying frank disclosures to informed counsel, the system cannot function effectively. Individuals and organizations would have less ability to protect their rights. This is especially true in the context of criminal law. The current language of the Commentary suggests that a waiver of the attorney-client privilege is a necessary condition of cooperation. The logical corollary of that position is that a refusal to grant such a waiver amounts to a failure to cooperate, which the government may effectively view as obstruction. This result would be a troubling and unwelcome burden on the attorney-client relationship. Our system of justice should encourage counsel to gather facts and give advice in confidence, not treat these essential functions as obstacles to be overcome.

Thank you for the opportunity to share the Association's views on this matter of critical importance.

Respectfully submitted,



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